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No. 89-1908

In The

Supreme Court Of The United States

OCTOBER TERM, 1989

STATE OF CONNECTICUT,
Petitioner

v.

JAMES KRISTY,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF CONNECTICUT

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QUESTION PRESENTED

Whether, under the double jeopardy doctrine of Grady v. Corbin, ___ U.S. ___, 58 U.S.L.W. 4599 (May 29, 1990), the Connecticut Appellate Court erred in holding that prosecution of the respondent for misconduct with a motor vehicle was barred by double jeopardy because the State would again rely upon proof of the same conduct upon which it had previously relied in prosecuting the respondent on charges of manslaughter in the second degree with a motor vehicle while intoxicated, charges for which he had been acquitted.

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OPINIONS BELOW

The opinion of the Connecticut Appellate Court is reported at 20 Conn. App. 495, 568 A.2d 809 (1990), and is reprinted in the appendix attached to the State of Connecticut's Petition for Certiorari at A-1 to A-7.

JURISDICTION

This Court has jurisdiction to review the decision of the Connecticut Appellate Court pursuant to 28 U.S.C. §1257. The Appellate Court's decision was issued on January 16, 1990 and was made final at the state level on March 28, 1990, when the Connecticut Supreme Court denied the petition for certification to appeal sought by the State of Connecticut.

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED

United States Constitution

Amendment V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have

the Assistance of Counsel for his defence.

Amendment XIV provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Connecticut Constitution

Article I, Section 8 provides:

In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel; to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process to obtain witnesses in his behalf; to be released on bail upon sufficient security, except in capital offenses, where the proof is evident or the presumption great; and in all prosecutions by information, to a speedy, public trial by an impartial jury. No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law; nor shall excessive bail be required nor excessive fines imposed....

Article I, Section 9 provides:

No person shall be arrested, detained or punished, except in cases clearly warranted by law.

Connecticut General Statutes

§53a-56b (rev. 1983) provided:

(a) A person is guilty of manslaughter in the second degree with a motor vehicle while intoxicated when, in consequence of his intoxication while operating a motor vehicle, he causes the death of another person. For the purposes of this section, "intoxication" shall include intoxication by alcohol or by drug or both.

(b) Manslaughter in the second degree with a motor vehicle while intoxicated is a class C felony and the court shall suspend the motor vehicle operator's license or nonresident operating privilege of any person found guilty under this section for one year.

§53a-57 (rev. 1983) provided:

(a) A person is guilty of misconduct with a motor vehicle when, with criminal negligence in the operation of a motor vehicle, he causes the death of another person.

(b) Misconduct with a motor vehicle is a class D felony.

Connecticut Rules of Court

Practice Book §624 provides:

After commencement of the trial for good cause shown, the judicial authority may permit the prosecuting authority to amend the information or indictment at any time before a verdict or finding if no additional or different offense is charged and no substantive rights of the defendant would be prejudiced. An amendment may charge an additional or different offense with the express consent of the defendant.

STATEMENT OF THE CASE

On December 21, 1983, the respondent, twenty year old James Kristy, and four friends suffered a one car accident on the Boston Post Road in Milford, Connecticut. Two passengers in the back seat died from their injuries. The other three occupants of the car were hospitalized.

Four months later on May 5, 1984, James Kristy was arrested by warrant and charged by information with two counts of manslaughter in the second degree with a motor vehicle, in violation of Conn. Gen. Stat. §53a-56b (rev. 1983). The gravamen of that charge is that a person has operated a motor vehicle while under the influence of an intoxicant and, as a result, has caused the death of another person. The crime requires proof of intoxication but does not contain a mental state element.

At trial on the manslaughter charges [hereinafter "Kristy (I)"), the state sought and received a jury instruction on misconduct with a motor vehicle, Conn. Gen. Stat. §53a-57, in addition to a jury instruction on the manslaughter counts charged in the information. Misconduct with a motor vehicle, unlike the manslaughter charge, has a mental state requirement, i.e., criminal negligence. The jury acquitted Mr. Kristy of both manslaughter counts and convicted Kristy of two counts of misconduct with a motor vehicle.

On appeal in Kristy (I), the Connecticut Appellate Court held that defendant Kristy "was convicted of an offense for which he was not on trial." State v. Kristy, 11 Conn.App. 473, 481 (1987). The Appellate Court ruled that misconduct with a motor vehicle had neither been charged expressly nor charged im-

pliedly in the information.[1] Thus he had been "convicted of a crime with which he was not charged". Kristy (I), 11 Conn.App. at 483. The Court noted that it could not order a new trial under the information filed by the state since it charged manslaughter alone and not misconduct with a motor vehicle. Id., at 484. Therefore, the Appellate Court found error, set aside the conviction for misconduct with a motor vehicle, and remanded to the trial court with direction to render judgment that Kristy was not guilty of manslaughter in the second degree with a motor vehicle while intoxicated and ordering that he be discharged.[2] Kristy (I), 11 Conn.App. at 485.

Because the Appellate Court opinion of July 7, 1987 in Kristy (I) contained dicta that "there is no double jeopardy barrier to the filing of a new information charging miscon-

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[1] Under Connecticut law, an information gives a defendant notice to defend against the charge named in the information and any lesser offense included within the crime. Kristy I, 11 Conn.App. at 481 (citing State v. Jacobowitz, 182 Conn. 585, 591 (1981)). The test for determining whether a lesser offense is implied or included in a charging document is articulated in State v. Whistnant, 179 Conn. 576, 588 (1980).

[2] Under Connecticut law, an unqualified judgment of acquittal obtains where a defendant is acquitted on the offense(s) charged in the information and where the state has not satisfied the requirements of Court Rule 624 in the Connecticut Practice Book which governs amendments to add new charges once trial has begun. See State v. Jacobowitz, 182 Conn. 585, 594 (1981); State v. Kitt, 8 Conn.App. 478, 490 (1986).

duct with a motor vehicle", id., at 483 n.6, respondent Kristy on July 17, 1987 moved for reconsideration and reargument on the double jeopardy issue thus presented. Following the Appellate Court's denial of said motion, the respondent on October 27, 1987 petitioned the Connecticut Supreme Court to consider whether double jeopardy barred reprosecution. The state opposed certification of the double jeopardy issue, arguing that "any legal claim that the defendant may have directed to the Appellate Court's note in dicta about reprosecution for misconduct with a motor vehicle is unripe".[3] On November 18, 1987, the State Supreme Court denied Kristy's petition for certification to appeal from the Appellate Court on the double jeopardy issue.

The respondent subsequently was discharged on December 8, 1987. The judgment entered in Kristy (I) was, per the rescript order of the Connecticut Appellate Court, that James Kristy was not guilty of manslaughter in the second degree with a motor vehicle while intoxicated.

On January 5, 1988, the State of Connecticut by an arrest warrant with an attached information commenced a new prosecution charging two counts of misconduct with a motor vehicle for the respondent's role in the automobile accident of December 21, 1983. On April 18, 1988, Mr. Kristy moved to dismiss on double jeopardy grounds. Following briefing

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[3] The state's Petition reasoned: "The defendant here has not yet been reprosecuted; indeed, it is uncertain what charges, if any, that the state may seek to press in the wake of these reversals.... In the event that the state does decide to reprosecute the defendant, he may press this claim in a motion to dismiss prior to any second trial."

by respondent Kristy and the State, on January 5, 1989 the trial court granted the motion to dismiss on double jeopardy grounds. The trial court found, and the State conceded, that it would rely on proof of the very same conduct at a new trial as it had earlier sought to prove at respondent's trial for manslaughter in the second degree. The trial court relied on the "modified Blockburger actual evidence test" announced by the Connecticut Appellate Court on September 27, 1988 in State v. Lonergan, 16 Conn. App. 358, 378 (1988). Lonergan was later affirmed by the Connecticut Supreme Court. State v. Lonergan, 213 Conn. 74 (1983).[4] This Court has recently denied Connecticut's petition for certiorari in Lonergan. 58 U.S.L.W. 3769 (June 4, 1990).

REASONS FOR DENYING THE PETITION FOR CERTIORARI

The State of Connecticut has sought review on two grounds.

First, the State sought review of the Connecticut Appellate Court's application of a "modified Blockburger actual evidence" test to this case. There was no dispute below concerning the outcome of that test in the respondent Kristy's favor. Instead, the issue before the Superior Court trial judge and the Connecticut Appellate Court was whether that test was constitutionally rooted or whether the Blockburger test alone governed. The

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[4] Lonergan was decided on both state and federal constitutional principles of double jeopardy. Lonergan (I), 16 Conn. App. at 363-64; Lonergan (II), 213 Conn. at 78-79. See Article I, §§8 and 9, Conn. Const. [supra, at 3].

State of Connecticut concedes in its petition for certiorari that the double jeopardy issue in Kristy "may be resolved by this Court's anticipated decision in Grady v. Corbin". State's Petition at 8. This Court has now decided Grady v. Corbin, 48 U.S.L.W. 4599 (May 29, 1990), favorably to the respondent's position herein. Respondent's reliance below on the double jeopardy doctrine of State v. Lonergan is further bolstered by this court's denial of certiorari in Connecticut v. Lonergan, 58 U.S.L.W. 3769 (June 4, 1990). In short, the State of Connecticut's petition on the double jeopardy issue in this case has recently been considered and rejected by this Court in Grady and in Lonergan.[5]

The State of Connecticut raises a second issue in its petition: whether respondent Kristy's appeal in Kristy (I) constituted a waiver of the double jeopardy bar under the so-called Ball rule. See Ball v. United States, 163 U.S. 662 (1896). The respondent urges this Court to follow the reasoning of the Connecticut Appellate Court which held: "Having obtained an improper conviction because of the erroneous jury charge in Kristy I, the state would enjoy an unjust benefit if we were to allow it to reprosecute the defen-

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[5] This Court in Grady held that the "Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted.... The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct." Id., at 4602. The Lonergan rule is identical to the Grady rule. Lonergan, 213 Conn. at 92.

dant on the same charges in a second trial." Kristy (II), 20 Conn.App. at 500.

The Appellate Court accurately interpreted the first prosecution, Kristy (I), to have resulted in a valid judgment of acquittal on the charges of manslaughter in the second degree. There was nothing defective about the information or the acquittals in Kristy (I). Further, as a matter of Connecticut law, the state charged misconduct with a motor vehicle neither expressly nor impliedly in its charging document in Kristy (I). See State v. Whistnant, 179 Conn. 576, 588 (1980); Rule of Court 624, Conn. Prac. Bk.

In this case there was no Ball waiver by dint of the respondent's successful appellate claim in Kristy (I) because respondent has consistently sought to enforce the only valid judgment resulting from his jury trial on manslaughter charges. Respondent's appellate claim in Kristy (I) was that the State of Connecticut had unjustly benefitted from a charge for which he was not on trial. The Connecticut Appellate Court agreed and ordered that a judgment of acquittal enter and that respondent be discharged. The Connecticut courts have steadfastly refused to countenance the State's claim that the judgment of acquittal in Kristy (I) was in any way qualified. The Connecticut courts have not held, as the State would have it, that the State, as a result of its first prosecution of James Kristy, had created and retained a kind of future interest in prosecuting Kristy for an offense not charged in Kristy (I).

ARGUMENT

As to the petitioner's first issue attacking the double jeopardy analysis applied

by the Connecticut Appellate Court, respondent respectfully rests on the reasons he has asserted in the prior section of this brief. He urges this Court to deny certiorari on the double jeopardy issue: this Court's decision in Grady v. Corbin, supra, forecloses the petitioner's claim.

As to the petitioner's second issue asserting that the respondent's appeal in Kristy (I) constituted a waiver under Ball v. United States, supra, the respondent relies on the foregoing two sections (Statement of Case and Reasons for Denying the Petition). Additionally, he submits the following.

The state essentially argues that James Kristy waived his double jeopardy protection against successive prosecutions when he made the appellate claim in Kristy (I) that he had been convicted of a crime with which he was never charged.[6] The respondent disagrees.

In support of its waiver argument, the petitioner cites cases in which retrial was permissible after reversal of a conviction on appeal. E.g., Montana v. Hall, 107 S.Ct. 1825 (1987) (per curiam); Ball v. United States, 163 U.S. 662 (1896). The case law is distinguishable. Firstly, the defendants in those cases had not been acquitted on a properly brought indictment or information at a first

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[6] In Kristy (I), the Appellate Court declared "[i]f [the defendant's] assertion is correct, the defendant was convicted of an offense for which he was not on trial". 11 Conn.App. at 481. (Emphasis added.) The Court held for the defendant: "We conclude that the defendant was convicted of a crime with which he was not charged...." Id., at 483.

trial. Mr. Kristy, by contrast, was acquitted on both counts of the information against him in Kristy (I). Secondly, in the aforesaid cases, the defendant on appeal sought to have the entire trial judgment declared void. By contrast, in Kristy (I) the defendant on appeal did not ask that the judgment below be "wholly nullified and the slate wiped clean". See, North Carolina v. Pearce, 395 U.S. 711, 721 (1969).

In Montana v. Hall, supra, the State of Montana originally sought to try the defendant for sexual assault, but the trial court granted defendant's motion to dismiss which asserted that "because the victim was his stepdaughter he could be prosecuted only for incest." Id., at 1825. The defendant was then charged with incest, after which he was convicted in a jury trial. The defendant's appeal of the incest conviction was successful because the state on appeal discovered and notified the Montana Supreme Court that the incest statute had not yet been effectively applicable to stepchildren at the time of the crime. Id., at 1826. The state sought certiorari in the Supreme Court to determine whether it could now prosecute the respondent for sexual assault. The Court in a per curiam opinion, without plenary briefing and over dissent, held that the defendant's first conviction for incest did not bar a trial on sexual assault, despite the state's original intent to prosecute on sexual assault, since "[a]t respondent's behest, Montana tried him instead for incest." Id., at 1827.

The distinctions between Montana v. Hall, supra, and the instant case are critical: (1) In Hall, the defendant on appeal sought reversal of the entire judgment, whereas in Kristy (I) the defendant's appeal left intact the defendant's judgment of acquittal on the

offenses actually charged (i.e., manslaughter in the second degree) that had been properly brought by the state; (2) in Hall, the defendant's chosen legal actions at the trial level generated the government's desire to try him successively, whereas in Kristy (I) it was the state's efforts to procure an instruction and conviction for an uncharged crime that generated the need for an appeal following his acquittal on the crimes actually alleged in the information.

In determining when the government may pursue a new prosecution following appellate reversal of a conviction, it is necessary to assess the respective roles played by the government and the defendant in effecting the need for further prosecution. The Fourth Circuit dealt with the respective roles question in United States v. Ashley Transfer & Storage Co., Inc., 858 F.2d 221 (4th Cir. 1988), where the government originally sought to try the defendants on a two-count conspiracy indictment. The defendants in Ashley Transfer moved to dismiss one count, claiming multiplicity. The trial court eventually dismissed one count and submitted the other to the jury. The defendants were acquitted, after which the government reindicted them on the dismissed count. The Fourth Circuit acknowledged that normally a "'second prosecution is barred by double jeopardy if the evidence actually used to prosecute the first offense would suffice to convict of the second offense as charged.'"[7] Ashley Transfer, supra, at 224 (quoting United States v. Ragins, 840 F.2d 1184, 1188 (4th Cir. 1988)). However, the Fourth Circuit held in Ashley Transfer

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[7] This is the modified Blockburger actual evidence test followed in State v. Lonergan, supra, and Grady v. Corbin, supra.

that "[t]he defendants' exposure to a second trial on count II is due only to their success in forestalling a proper adjudication of count II in the first trial". Id., at 225. The Ashley Court further explained:

> When a defendant's choice and not the government's choice and not government oppression causes successive prosecutions, "no interest protected by the double jeopardy clause is invaded when the government is allowed to appeal and seek reversal of a midtrial termination of the proceedings in a manner favorable to the defendant."

Id., at 225, quoting in part, United States v. Scott, 437 U.S. 82, 100 (1978); see also, Jeffers v. United States, supra, at 150-54 (defendant "solely responsible" for successive prosecutions on two related charges); Ohio v. Johnson, 467 U.S. 493, 502 (1984) ("even clearer case than Jeffers").

In the instant case, patently one cannot ascribe the cause of the second prosecution to "a defendant's choice" as in Ashley Transfer, supra. Surely, the defendant is not "solely responsible" for his second prosecution as in Jeffers, supra. It is fundamental that the prosecution exercises its broad discretion in fashioning the charging document.[8] The govern-

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[8] The Connecticut Supreme Court in State v. Paolella, 210 Conn. 110 (1989), declared: "The tacit premise of the state's argument appears to be that it was the defendant's obligation to ensure that the state charged him with a crime corresponding to the facts likely to be adduced at trial. We are not (continued...)

ment's failure to bring every charge that it desired, based upon the same conduct and same incident, in the Information in Kristy (I) is the root cause of the government's current perceived need to prosecute Mr. Kristy anew. Because no Ball waiver took place in this case, this Court should deny review to the State of Connecticut.

CONCLUSION

The instant case raises neither a novel, important issue of law nor an issue upon which there is serious division of authority. This case involves Connecticut rules concerning the ambit of charging documents and the state's failure to charge all offenses on which it was later to desire jury instructions in Kristy (I). The case raises an issue of waiver on the part of the State of Connecticut in failing to follow Connecticut rules of practice. See State v. Jacobowitz, supra; State v. Paolella, supra; Court Rule 624, Connecticut Practice Book. As the Appellate Court held, "[h]aving obtained an improper conviction because of the erroneous jury charge in Kristy I, the State would enjoy an unjust benefit if we were to allow it to reprosecute the

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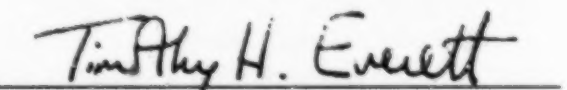
[8](...continued)
persuaded that a criminal defendant must oblige the state in this manner in order to invoke the protections of the double jeopardy clause." Id., at 125. The Paolella Court's position finds support in this Court's admonition in Grady v. Corbin, supra, that while prosecutor's offices are often overworked and oversights in their charging decisions are sometimes understandable, that "cannot excuse the need for scrupulous adherence to our constitutional principles." Id., at 4603.

defendant on the same charges in a second trial." State v. Kristy, 20 Conn. App. at 500.

For these reasons, the respondent respectfully asks this Court to deny Connecticut's Petition for Certiorari to the Connecticut Appellate Court.

James Kristy, The Respondent



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